

NO. 48227-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

RITA E. MADRIGAL,

Appellant.

REPLY BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

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ARGUMENT

THE COURT DID NOT ADMIT IDENTIFICATION NO. 6 INTO EVIDENCE UNDER ER 803(a)(5) OR ANY OTHER THEORY AND TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO OBJECT WHEN THE PROSECUTOR READ THE UNADMITTED EXHIBIT INTO EVIDENCE AND LATER ARGUED SUBSTANTIVELY FROM THAT EXHIBIT.

The defendant's first argument in the opening brief of appellant was that trial counsel's failure to object when the state used impeachment as a guise for submitting otherwise unavailable substantive evidence to the jury and when the state argued substantively from that impeachment evidence in closing denied the defendant effective assistance of counsel. Specifically, defendant argued that counsel was ineffective when he failed to object to the prosecutor reading the complaining witnesses's statement to the police, Clerk's Identification No. 6, into evidence and arguing substantively from that statement because the trial court did not admit it into evidence. In response, the state argues as follows:

In this case the victim's statement to police was read into the record after the victim claimed a lack of memory as the events described in the statement. Madrigal contends that the admission of this evidence was error, but her claim of error is premised upon the mistaken assertion that the testimony was offered as impeachment evidence rather than as substantive evidence under ER 803(a)(5). The State contends that trial counsel was not ineffective, because any objection to testimony about the victim's statement to police would have failed because the testimony was admissible as a recorded recollection under ER 803(a)(5).

Brief of Respondent, page 1.

REPLY BRIEF OF APPELLANT - 2

The state's argument might have had merit had the state pursued the admission of Identification No. 6 under ER 803(a)(5). However, after the state moved for the admission of the exhibit and the defense asked to be heard on the matter, the court held an unrecorded sidebar and then denied the motion. This exchange went as follows:

MR. RICHARDS: All right. Your Honor, I'm going to at this time request that this document be admitted under the hearsay rule, prior – or prior recollection recorded.

THE COURT: Mr. Jones.

MR. JONES: Not an argument I was anticipating, your Honor.

THE COURT: And Mr. Richards, would you cite the Evidence Rule you're looking at?

MR. RICHARDS: Certainly, your Honor. It's under 803 – I got – I need to get the – take a look at that for – your Honor, just for the record –

MR. JONES: Perhaps we could have a side bar, your Honor?

THE COURT: Side bar.

SIDE BAR CONFERENCE

Side bar at the request of defense counsel off the record.

THE COURT: You may proceed.

MR. RICHARDS: Thank you, your Honor.

RP 29-30.

At the next break the court put the substance of the sidebar on the

record and clarified that it had not granted the motion to admit the exhibit into evidence substantively and that it had only approved the use of the exhibit for impeachment. The court noted the following on this point:

COURT: Please be seated. We need to address on the record the side bar which occurred during this last segment. And there was an initial request under ER 803 to admit a document. And that was objected to, and there was a discussion at side bar that that document would not be requested to be admitted today, and potentially would be requested to be admitted tomorrow morning, after counsel has had an opportunity to research this issue. And instead the colloquy that occurred was more in the lines of impeachment. Is there anything that I'm missing from that side bar, Mr. Richards?

MR. RICHARDS: I think it sums it up pretty good, your Honor.

THE COURT: And Mr. Jones.

MR. JONES: Only I – I believe the issue is going to be moot tomorrow because I think Corporal Ripp's going to be able to authenticate the affidavit as a Smith affidavit and it's going to come in that way.

THE COURT: Okay. Well at this point we'll just deal with it when – if it's offered, we'll deal with that issue.

MR. RICHARDS: Thank you, your Honor.

THE COURT: Okay. Anything further that needs to be dealt with today before we go into recess?

MR. RICHARDS: I don't think so.

RP 29-30.

At no subsequent point during trial did the state move to admit Identification No. 6 substantively under ER 803 or under any other argument.

In spite of this fact the state argued substantively from this exhibit during closing with no objection from the defense. The state argued:

You – you know that – well, Mister – Mr. Pena claimed that he had no memory of what happened. But frankly it's absurd. His claim simply doesn't – doesn't hold water at all. So we had to go through the affidavit that he filled out at the time. And we talked about what was in that during the testimony. We went through it. He said yes, he'd been assaulted by being cut with a knife and a saw. That's exactly what Nigel testified to. That she assaulted him. And he said she was his ex-girlfriend. And I'm sure anybody at that time would have felt that way. That she used a hammer to break the lights of his vehicle. And it happened at his residence.

And then when Deputy Ripp – or excuse me, when Corporal Ripp testified, he testified that he had written it in his terms. He kind of translated him writing it. So he's not talking in the third person here. So Corporal Ripp wrote, and he signed off on, Otiel was organizing his tools and Rita started an argument over Otiel being on the property. Rita grabbed a hammer and started hitting items, including swinging the hammer and a saw towards Otiel. Rita cut Otiel with the saw on the left arm. Otiel took his seven year old son and walked down the road. Otiel called 911. Otiel spoke with the law over the phone, but did not mention the assault.

Otiel came back to the property and started working on the patio. Otiel walked over to his RV and Rita approached him holding a knife. Rita cut Otiel with the knife and screamed at Otiel to leave. Otiel did not fight back at all. Otiel had his 2½ year old daughter in his arms when Rita swung the knife at him.

That statement was given right at the time it all happened, while it was fresh in his memory. Nigel, the seven year old son, got up here and testified essentially to the same thing. She attacked him. Yes, it can happen. Why'd she attack him? Maybe she was having a really bad day.

RP 105-106.

In this passage the prosecutor argued from the substance of the

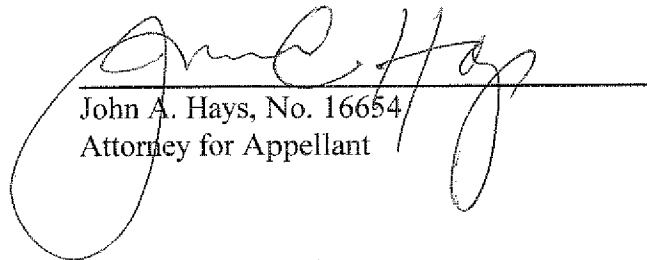
statement and invited the jury to convict based upon the substance of the statement. In so doing the prosecutor improperly argued substantively from an exhibit that was allowed solely for impeachment and had not been admitted under ER 803 or any other legal theory. The state's first argument in the Brief of Appellant is not well taken.

CONCLUSION

Trial counsel's failure to object when the state used impeachment as a guise for submitting otherwise unavailable substantive evidence to the jury and trial counsel's failure to object when the state argued substantively from that impeachment evidence in closing denied the defendant effective assistance of counsel under Washington Constitution, Article I, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 25th day of April, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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vs.

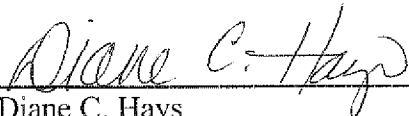
**AFFIRMATION
OF SERVICE**

RITA E. MADRIGAL,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 25th day of April, 2016, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

April 25, 2016 - 3:06 PM

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